Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMERICAN NATIONAL INSURANCE COMPANY; AMERICAN NATIONAL INVESTMENT ACCOUNTS, INC.; SM&R INVESTMENTS, INC.; AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY; STANDARD LIFE AND ACCIDENT INSURANCE COMPANY; FARM FAMILY LIFE INSURANCE COMPANY; FARM FAMILY CASUALTY INSURANCE COMPANY; and NATIONAL WESTERN LIFE INSURANCE COMPANY
Plaintiffs

v.

ARTHUR ANDERSEN, L.L.P., D. STEPHEN GODDARD, JR. ;DAVID DUNCAN; KENNETH L. LAY; JEFFREY K. SKILLING, ANDREW S. FASTOW, RICHARD A. CAUSEY; RICHARD B. BUY; MICHAEL J. KOPPER; ROBERT K. JAEDICKE; RONNIE C. CHAN; JOE C. FOY; JOHN WAKEMAN; WENDY L. GRAMM; BRUCE G. WILSON; JOHN MENDELSON; PAULO V. FERRAZ PEREIRA; ROBERT A. BELFER; NORMAN P. BLAKE, JR.; JOHN H. DUNCAN; CHARLES A. LEMAISTRE; FRANK SAVAGE; HERBERT S. WINOKUR, JR.; KEN L. HARRISON; REBECCA MARK-JUSBASCHE; JEROME J. MEYER; JOHN A. URQUHART; and CHARLES E. WALKER
Defendants

§

CIVIL ACTION NO. G-02-0084
CONDOLIDATED WITH H-01-3624

PLAINTIFFS' REPLY TO ARTHUR ANDERSEN'S RESPONSE TO REMAND MOTION AND PLAINTIFFS' REQUEST FOR ORAL ARGUMENT

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Plaintiffs, American National Insurance Company; American National Investment Accounts, Inc.; SM&R Investments, Inc.; American National Property And Casualty Company; Standard Life and Accident Insurance Company; Farm Family Life Insurance Company; Farm Family Casualty Insurance Company; and National Western Life Insurance Company ("Plaintiffs") have requested remand to the 56th Judicial District Court of Galveston County, Texas, because this Court lacks subject matter jurisdiction over this action. This Reply is filed to rebut inaccurate statements of fact and of law made in Defendant Arthur Andersen's Response to Plaintiffs' Remand Motion ("*Response to Remand Motion*").

Defendant Arthur Andersen ("Andersen") proposes two implausible theories for removal. The first requires this court to do away with the well-pleaded complaint rule, disregard the principles of comity upon which our state and federal systems co-exist, and hold that an action between a plaintiff and defendant can be removed pursuant to 28 U.S.C. §§ 1367 and 1441 based upon the existence of a federal question in a **different** lawsuit between a **different** plaintiff and the defendant. The second theory is simply a request by Andersen for the Court to disregard the plain, easy-to-understand provision of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. § 78bb(f)(5)(F), which reserves to the state court, not a federal court, the discretion to consolidate actions which are before it such that the consolidated action may be considered a "covered class" under the Act.

In its Response to the Remand Motion, Andersen alleges that the "American National Companies have failed to take issue with" a number of statements in Andersen's removal petition. The need to rebut this false allegation prompts this Reply and request for oral argument.

APPLICABLE LAW

This Court recently discussed the law applicable to removal generally and to SLUSA specifically preemption which clearly establishes Plaintiffs' entitlement to remand:

> Defendants, who removed this action based on 28 U.S.C. §1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."), have the burden of proving that this Court has jurisdiction over this suit.
>
> Plaintiffs assert claims under Texas common law. Generally federal jurisdiction exists only if the federal question is facially evident in the plaintiff's well-pleaded complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Terrebonne Homecare, Inc. v. SMA Health Plan, Inc.*, 271 F.3d 186, 188 (5th Cir. 2001). Moreover, a plaintiff is master of his complaint and may choose the law, on which he wishes to rely to avoid removal to federal court. *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362, 366 (5th Cir. 1995).
>
> As a narrow exception to the well pleaded complaint rule, the artful pleading doctrine applies where federal law completely preempts the field and prevents a plaintiff from precluding removal by failing to plead necessary federal questions. *Id*; *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 783 (5th Cir. 200), *citing Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. . . Although federal preemption is ordinarily a defense, once the area of state law has been completely considered, any claim purportedly based on the preempted state law is considered from its inception, a federal claim and therefore arises under federal law."). Thus Defendants bear the burden of demonstrating that a federal right is an essential element of Plaintiffs' claims and that Congress intended SLUSA to preempt Plaintiffs' claims.
>
> Federal law may preempt state law in any of three ways: (1) Congress may expressly define the extent to which it intends to preempt state law; (2) Congress may indicate an intent to occupy an entire field of regulation; or (3) Congress may preempt a state law that conflicts with federal law even when it has not expressly preempted the state law nor indicated an intent to occupy the field. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 911 F.2d 993, 9998 (5th Cir. 1990) (*citing Michigan Canners and Freezers Assoc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984)), *cert. dismissed*, 502 U.S. 954 (1991).
>
> Congress has enacted several federal statutes in the past few years to attempt to establish uniformity in the securities markets. The Private Securities Litigation Reform Act of 1995

("PSLRA"), 15 U.S.C. §§77z-1, 78u, which amended the 1933 Securities Act and the 1934 Securities Exchange Act, set out heightened pleading requirements and for complaints under Rule 10b-5 mandated pleading of specific facts creating a strong inference of scienter for private class actions and other suits alleging securities fraud in an effort to minimize meritless lawsuits. 15 U.S.C. §78 *et seq* H. Conf. Rep. No. 105-803 (1998). When, as a result, plaintiffs began filing in state rather than federal court, asserting claims under state statutory or common law to avoid the PSLRA's stringent procedural and pleading hoops, Congress passed SLUSA in 1998 to close the loophole. 144 Cong. Rec. H10771 (daily ed. Oct.13. 1998, 1998 WL 712049). SLUSA in essence made federal court the exclusive venue for securities fraud class actions meeting its definitions and ensured that they would be governed exclusively by federal law. 15 U.S.C. §77p(b) - (c). Congress' purpose in enacting the statute was to "'prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State court, rather than Federal court.'" *Korsinsky v. Salomon Smith Barney, Inc.*, No. 01 6085 (SWK), 2002 WL 27775, *3 (S.D.N.Y. 2002) *quoting* H.R. Conf. Rep. No. 105-803 (1998). Moreover, the Court observes that the same report indicates that in SLUSA Congress did not evidence an intent to occupy the entire field of securities regulation, but expressly delineated the scope of preemption:

> [I]n order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

H.R. Conf. Rep. 105-803, *2.

With respect to removal, the plain language of SLUSA, 15 U.S.C. §77p (c), evidences Congress' intent to preempt a specific category of state-law class actions, which it defines as follows: "Any covered class action brought in any State Court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending. . ." Title 15 U.S.C. §78bb (f)(5)(B) defines a "covered class action" as

> (i) any single lawsuit in which—
> (I) damages are sought on behalf of more that 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominated over any question affecting only individual persons or members or
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common

to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. §78bb (f)(5)(B).

A "covered security" is defined as a security that satisfies the standards for covered security specified in paragraph (1) or (2) of section 77r(b) of this title, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred. . . ." 15 U.S.C. §77p (f)(3). Section 77r(b), adopted by §78bb (f)(5)(E), defines a "covered security" as one listed on the New York Stock Exchange, the American Stock Exchange, or the Nasdaq National Market, or a security issued by an investment company that is registered, or for which a registration statement has been filed under the Investment Company Act of 1940. SLUSA provides for mandatory removal and dismissal of a specific kind of class action:

(f) LIMITATIONS ON REMEDIES. --

(1) CLASS ACTION LIMITATIONS.—No covered class action based upon the statutory or common law of any state or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) REMOVAL OF COVERED CLASS ACTIONS.—Any covered class action brought in an State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

15 U.S.C. § 78bb (f)(1)(A), (B) & (2). Thus SLUSA authorizes the removal of all private actions that are actually traditional securities claims that fall within its ambit to be removable to federal court and makes the state law claims subject to dismissal. 15 U.S.C. § 78bb (f) (1) - (2). *Korsincky*, No. 01 6085 (SWK), 2002 WL 27775 at *3; *Hardy v. Merrill Lunch*, No. 01 Civ. 5973(NRB), 2001 WL 1524471, *2 (S.D.N.Y. Nov. 30, 2001).

To defeat a motion to remand for improper removal under SLUSA, Defendants must show

that (1) the action is a "covered class action" under SLUSA; (2) that the causes of action on their face are based on state statutory or common law; (3) that it involves a "covered security" under SLUSA; (4) that it alleges Defendants have misrepresented or omitted material facts; and (5) that the alleged misrepresentation or omission was made "in connection with" the purchase or sale of the covered security. *Korsinsky*, 2002 WL 27775, *3; *Hardy*, 2001 WL 1524471 at *3.

Newby v. Enron Corp., Memorandum and Order (February 6, 2002) (*"Newby Memorandum")* at 9-14.

Because the defendant is the party seeking the jurisdiction of the federal court in a removal case, it has the burden of showing that the case is capable of being removed -- *i.e.,* that the federal jurisdictional requirements are present. *Kidd v. Southwest Airline, Co.*, 891 F.2d 540, 543 (5th Cir. 1990). Moreover, "if any presumption exists it is that a case is outside federal jurisdiction." *Clinton v. Hueston*, 308 F.2d 908, 910 (5th Cir. 1962). *See also Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979).

Andersen fails to meet its burden because both theories proposed as the bases for removal are without any basis in the law. Andersen's first thoery, supposedly premised upon the general removal and supplemental jurisdiction statutes, fails because there exists no basis, and Andersen provides none , for ignoring the well-established rules governing supplemental jurisdiction or for disregarding the well-pleaded complaint rule. Andersen's second theory, based upon SLUSA preemption, fails because Plaintiffs' action is not a "covered class action" as defined by SLUSA.

THERE EXISTS NO SUPPLEMENTAL JURISDICTION

Plaintiffs assert only state law claims. Despite the absence of any federal question, Andersen proposes that Plaintiffs' action against Andersen can be removed on the basis of the existence of a federal question in another action brought by other plaintiffs, in a different court, asserting different causes of action. This proposition is plainly counter to well-established law and Andersen fails to cite a single case which supports this bizarre new theory of supplemental jurisdiction. The hodge-podge of decisions cited by Andersen concern either diversity jurisdiction, federal pre-emption, or merely reiterate the general rules governing removal; none concern a situation where an action by a plaintiff in one court is removed based upon a federal question in an action brought by a different plaintiff in a completely different lawsuit. Andersen cites a total of ten cases to support its "supplemental jurisdiction" hypothesis. Half of these merely provide discussions concerning the general jurisdictional and removal rules. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Hurn v. Oursler*, 289 U.S. 238 (1933); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175 (1909); *Chicago v. International College of Surgeons*, 522 U.S. 156 (1977); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). Three decisions concern diversity jurisdiction questions. *Manguno v. Prudential Property & Casualty Co.*, 276 F.3d 721 (5th Cir. 2002) (whether the $75,000 amount in controversy requirement for diversity jurisdiction may be met by aggregating the damages claims of multiple plaintiffs); *Free v. Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995)

(same); *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929 (8th Cir. 1999) (whether attorney's fee may be added to the damages claim in order to meet the $75,000 minimum for diversity jurisdiction). The remaining two concerned SLUSA preemption, not jurisdiction based upon the supplemental jurisdiction statute. *In re Lutheran Brotherhood Variable Insurance Products Co. Sales Practices Litigation*, 105 F.Supp.2d 1037 (D. Minn. 2000) (action was preempted under SLUSA because it was a class action – and hence a "covered class action" -- subject to SLUSA preemption; decision was not based upon the supplemental jurisdiction statute); *Newby Memorandum (Newby v. Enron*, No. H-01-3624, Memorandum and Order (S.D. Tex., Feb. 6, 2002)).

Andersen's proposition notwithstanding, the well-pleaded complaint rule is still recognized under federal law. Absent diversity of citizenship, "only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Whether a federal question exists depends upon the well-pleaded complaint rule, which provides that the plaintiff's complaint governs the jurisdictional determination. *Id.* If the complaint, on its face, contains no issue of federal law, then there is no federal question jurisdiction. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983).

The well-pleaded complaint rule and its implications are discussed in Plaintiffs' Remand Motion and, further, are discussed in the *Newby Memorandum* cited by Andersen. Yet, Andersen fails to mention the rule, much less address and explain how it is not

applicable to Plaintiffs' action; Andersen just pretends that no such rule exists. The exception to the rule, where the plaintiff's right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties, is not raised by Andersen and is plainly not applicable in this case. *See Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983). Texas has a well-developed body of both statutory and judicially-created securities law and resolution of Plaintiffs' claims does not, in any way, require resolution of any federal issue. Plaintiffs' action, accordingly, is not removable under the general-application jurisdiction and removal statutes.

In short, Andersen's argument is not even a good-faith argument for extension of the law. It is an ill-conceived attempt to convince the Court to ignore well-established precedent.

SLUSA IS NOT APPLICABLE TO PLAINTIFFS' ACTION

Plaintiffs' lawsuit against Defendants is not preempted because it is not a "covered class action" under SLUSA:

> B. Covered class action. The term "covered class action" means --
> (i) any single lawsuit in which --
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named plaintiffs seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which --

(I) damages are sought on behalf or more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5).

In Plaintiffs' action, there are eight Plaintiffs. None of the Plaintiffs seek damages on behalf of other unnamed parties similarly situated and Plaintiffs' action has not been consolidated by the state court with any other actions. Plaintiffs' lawsuit, accordingly, is not a "covered class action" and therefore is not removable under SLUSA.

Andersen asks the Court to ignore the plain language of section 78bb(f)(5)(B) by arguing that this Court should consolidate various other, unspecified[1] actions with Plaintiffs' lawsuit such that the magic number of 50 plaintiffs – the number required for SLUSA removal unless the plaintiffs file the case as a class action -- is met. SLUSA, however, expressly prohibits the federal court from doing this, instead reserving the decision to the state court. SLUSA provides for the "discretion of a State court in determining whether actions filed in such court should be consolidated, or otherwise allowed to proceed as a single action." 15 U.S.C. § 78bb(f)(5)(F).

Andersen alleges that Plaintiffs have "not taken issue" with ten statements found in Andersen's removal petition. *Response to Remand Motion* ¶ 22. All of these statement, however, concern the same issue – Andersen's outlandish proposition that this Court can consolidate cases pursuant to the Texas Rules of Judicial Administration. As Plaintiffs pointed out in their Remand Motion, SLUSA reserves to the state court the discretion to consolidate cases for the purpose of creating a consolidated "covered class." *See* 15 U.S.C. § 78bb(f)(5)(F). Andersen fails to provide a reason for ignoring 15 U.S.C. § 78bb(f)(5)(F). Further, Andersen fails to explain how a federal court can apply the Texas Rules of Judicial Administration, which expressly require specific state court judges to make determinations under those Rules and which provide for review by the Texas Supreme Court.

Notwithstanding that SLUSA clearly precludes a defendant or a federal court from plucking state court actions, which allege only state law claims, from around the state for the purpose of combining these cases to create "covered class action," Plaintiffs will address each of the ten statements (all concerning consolidation under the Texas Rules of Judicial Administration) that Andersen accuses Plaintiffs of failing "to take issue with." *See Response to Remand Motion* ¶ 22.

(1) "Defendants have a right under Texas law to consolidate all of these actions before a single court judge. *See* Tex. R. Jud. Admin. 11.4(h)."

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[1] Anderson lists a number of cases currently pending in federal court. *Andersen's Response* ¶ 22(g), n.3. SLUSA, however, is only applicable to actions pending in a state court.

First, a defendant has no "right" to consolidate actions, a defendant only has the right to move for, or request, consolidation. *Id.* 11.4(a). Second, any decision to consolidate must be made by a Texas state court judge, the presiding judge of a region of Texas. *Id.* 11.3(a). Third, the plaintiff must be provided due process protection because "the presiding judge may not grant the motion [to consolidate] without conducting an oral hearing." *Id.* 11.4(f). Fourth, any consolidation under the Texas Rules of Judicial Administration is entirely a state court matter because consolidation of cases under a single pretrial judge "may be reviewed only by the Supreme Court [of Texas] in an original mandamus proceeding." *Id.* 11.5.

(2) "The presiding judge must grant the motion or request if the judge determines that: (1) the case involves material questions of law and fact common to a case in another court and county; and (2) assignment of a pretrial judge would promote the just and efficient conduct of the cases. Otherwise, the presiding judge must deny the motion or request."

This rule requires that the Texas state court presiding judge, not the defendant or the federal court, make the consolidation determination. *Id.* 11.4(h). In any event, Andersen fails to identify any case in another court and county involving material questions of fact and law common to the action brought by Plaintiffs. The Texas Rules of Judicial Administration require that the party requesting consolidation identify each action subject to the consolidation request and "the motion or request must be filed in all cases" which are subject to the consolidation request. *Id.* 11.4(c). Andersen, therefore, fails to demonstrate even a basis for *request* of consolidation, much less a "right" to consolidation.

(3) "Moreover, a refusal to grant a consolidation motion is subject to mandamus review by the Texas Supreme Court. *See* Tex. R. Jud. Admin. 11.5."

Is Andersen suggesting now that this Court is subject to mandamus review by the Texas Supreme Court?

(4) "The actions subject to this right of consolidation are, for all practical purposes, "pending in the same court" for purposes of the above SLUSA definition."

Again, Andersen fails to identify any "actions subject to this right of consolidation" presently pending in state court. Moreover, the statement that "the actions" are pending in the same court "for all practical purposes" is nonsensical. A case is pending in the court in which it is pending, not in some other court "for practical purposes."

(5) "This case would have been consolidated with other Enron-related cases pending in Harris and surrounding counties in the Second Administrative Judicial Region of Texas."

As noted, cases may be consolidated only after the plaintiff has had the opportunity to be heard at an oral argument concerning a defendant's request for consolidation. *Id.* 11.4(f). Moreover, the presiding Texas state court judge may consider evidence, such as affidavits, tendered by the plaintiff. *Id.* 11.4(g). Only the presiding state court judge, not Andersen, can determine if cases should be consolidated. Further, the allegation that cases "would have been" consolidated is not only mere speculation, but even if true, not material. Only cases currently pending in the state court may be consolidated under the Texas Rule of Judicial Administration. *See Id.* 11.1.

(6) "Any ruling otherwise by this Court would require defendant to go through the empty formality of consolidating the cases in state court, unnecessarily delaying the removal permitted by Congress."

The opportunity to be heard at oral argument by a state court judge, the opportunity to present evidence to the state court judge, and the right of mandamus review before the Texas Supreme Court are not "empty formalities."

(7) "There are numerous state court cases that were filed in local state courts arising from Enron financial difficulties in which more than 50 plaintiffs seek damages."

The fact that there were actions filed in state court which were subject to SLUSA preemption, and thus removed to federal court, has no bearing on whether Plaintiffs' action is subject to SLUSA preemption. Plainly Plaintiffs' action is *not* a case with more than 50 plaintiffs.

(8) "The defendant has a right under State law to consolidate the American National Companies' claims in the same state court with the other numerous Enron claim."

Again, Andersen has no right of consolidation; only the presiding judge can determine whether consolidation is appropriate after the defendant files a proper request for consolidation and the plaintiff has had the opportunity to be heard. *Id.* 11.4(a)-(g). Further, Andersen does not even specify the county, much less the specific "same state court with the other numerous Enron claims."

(9) "The American National Companies should be treated as having been "consolidated . . . for any purpose" with the other Enron-related cases."

This is more Andersen doubletalk. A court may order consolidation of cases or it may decline to consolidate cases. Plaintiffs' action, was not consolidated with any other actions

by the state court and therefore cannot be treated as having been consolidated by the state court.

(10) "Forcing the defendants to state court to consolidate actions arising from Enron's financial difficulties would be an empty formality because defendants have a right to consolidate under Texas law."

Plainly the opportunity to be heard at oral argument by a state court judge, the opportunity to present evidence to the state court judge, and the right of mandamus review before the Texas Supreme Court are not "empty formalities." Moreover, as discussed, the presiding state court judge, not Andersen, must determine whether actions should be consolidated.

After analyzing Andersen statements, it becomes clear that Andersen not only failed to demonstrate how a federal court can adopt Texas procedural rules, Andersen failed to even provided the information necessary for properly *requesting* consolidation from the state court. A motion or request for consolidation must include the number and style of each case pending in a state court for which consolidation is sought. *Id.* 11.4(b)(1). Andersen, however, does not identify *a single case* pending in state court that could be subject to consolidation with Plaintiffs' action.

PRINCIPLES OF COMITY AND FEDERALISM PROHIBIT A FEDERAL COURT FROM ADOPTING ANDERSEN'S NOVEL APPORACH TO FEDERAL SUBJECT MATTER JURISDICTION

It is axiomatic that the statutes conferring removal jurisdiction are to be construed strictly. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). "Removal jurisdiction encroaches on state jurisdiction, and the interests of comity and federalism require that federal jurisdiction be exercised only when it is clearly established." *Holston v. Carolina Carriers Corp*, 1991 U.S. App. Lexis 14129 at *7-8 (6th Cir.1991). *See also, e.g., Guzzino v. Felterman*, 191 F.3d 588, 595 (5th Cir. 1999) ("interests of comity and federalism markedly tip the balance in favor or remand"). Accordingly, "[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand." *Manguno v. Versus Prudential Property and Casualty Ins. Co.*, 2002 U.S. App. Lexis 223 at *5 (5th Cir. 2002) (citing *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir. 2000)).

Andersen's failure to cite any authority supporting its novel supplemental jurisdiction theory undeniably shows that the theory is not a "clearly established" basis for exercising federal jurisdiction. Not only is the theory in conflict with well established law, its application would be counter to the principles of comity and federalism. Neither Anderson nor any defendant should be allowed to go around the state or around the country, remove to federal court actions based solely upon state law claims, and then claim the "right" to have them all consolidated, based upon the defendant's allegation that these cases have common facts.

Andersen's theory that Plaintiffs' action may be removed pursuant to SLUSA not only conflicts with the plain language of the Act, but also violates principles of comity and federalism. SLUSA does not completely preempt the field of securities law, but rather "evinces Congress' intent to preempt a specific category of state-law class actions." *Newby Memorandum* at 12. Because Plaintiffs' action is not a "covered class action" pursuant to SLUSA, the action is not subject to removal. Andersen's strange application of state judicial administration procedures and its ambiguous explanation of how Plaintiffs' action can somehow be combined with other actions, which are not even pending in state court, is the type of ambiguity which requires remand.

CONCLUSION

Andersen fails to meet its burden of demonstrating that this Court has subject matter jurisdiction over Plaintiffs' claims. Plaintiffs' Motion to Remand, accordingly, should be granted and this action should be remanded to the 56th Judicial District Court of Galveston County, Texas. In the event the action is not remanded, based upon Plaintiffs' submission, Plaintiffs request oral argument.

Respectfully submitted,

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I certify that a copy of this motion was served on counsel for each party as listed on the attached service list on March 6, 2002.

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